IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-69

ROBERT A. PANORA, Registrar of Motor Vehicles of the Commonwealth of Massachusetts,
Appellant,

v.

DONALD E. MONTRYM, et al.,
Appellees.

On Appeal From the United States District Court for the District of Massachusetts

SUPPLEMENTAL BRIEF IN SUPPORT OF APPELLEE'S MOTION TO AFFIRM

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INTRODUCTION

In light of the district court's October 6, 1977 opinion, and pursuant to this Court's February 21, 1978 order, this memorandum is submitted to supplement appellee's motion to affirm.

ARGUMENT

I The Private Interest Affected Under G.L. Ch. 90 Section 24(1)(f) Is Far Greater Than The Interest Under The Illinois Procedure Under Consideration In Dixon v. Love, 431 U.S. 105.

Montrym asserts that the total loss of one's driver's license is a deprivation of an entitlement sufficient to invoke the protection of the Due Process Clause:

> Once [driver's] licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that ajudicates important interest of the licensees. In such cases, the licenses are not to be taken away without that due process required by the Fourteenth Amendment. Bell v. Burson, 402 U.S. 535, 539.

As such, this court required "notice and opportunity for hearing appropriate, to the nature of the case, before termination

becomes effective," Bell v. Burson, supra, at 542. Notwithstanding the Bell pronouncements, the Registrar in his Jurisdictional Statement at pp. 12-13 argues that Dixon v. Love, 431 U.S. 105, "concludes" that the driver's license interest "is not so great as to require a prior hearing" before suspension.

Montrym maintains that the driver's license interest in Dixon is distinguishable from the instant case since the Illinois procedure takes into account "undue hardship" by providing for commercial driver permits and restricted permits allowing driving between a licensee's residence and place of employment. These provisions ameliorate the potential loss "in the pursuit of a [licensee's] livelihood". On the other hand, the Massachusetts procedure has no comparable provisions. Accordingly, Montrym maintains that the district court's finding that the license loss under G.L. Ch. 90 §24(1)(f) constitutes irreparable harm is eminently correct. Indeed, all the federal court decisions

that have considered the issue have reached the same conclusion.1

II The Risk Of Error Under The Massachusetts Procedure Is Far Greater Than Under The Illinois Procedure.

Under the Illinois procedure, revocation by the Secretary of State was automatic and based upon three suspensions within a ten year period. Each suspension in turn was predicated upon a final adjudication of guilty by a court of competent jurisdiction. As such, this Court held in Dixon, supra, at pp. 108-9, that the risk of erroneous deprivation was minimal:

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1 Besides the cases cited in appellee's motion to affirm at pp. 5-6, see Cicchetti v. Lucey, 377 F. Supp. 215 (D. Mass.), rev'd on other grounds, 514 F. 2d 362 (1st Cir. 1975); and Pollard v. Panora, 411 F. Supp. 580 (three judge court, D. Mass. 1976). See also Judge Campbell's dissent set forth in the Registrar's Jurisdictional Statement at p. 20a: "There is my brothers say, no way to make, someone whole for mistaken deprivation of a license. I suppose [this] has to be conceded."

> Under the Secretary's regulations, suspension and revocation decisions are largely automatic. Of course, there is the possibility of clerical error, but written objection will bring a matter of that kind to the Secretary's attention. In this case appellee had the opportunity for a full judicial hearing in connection with each of the traffic convictions on which the Secretary's decision was based. Appellee has not challenged the validity of those convictions or the adequacy of his procedural rights at the time they were determined. ... We conclude that requiring additional procedures would be unlikely to have significant value in reducing the number of erroneous deprivations.

By contrast, the predicate for suspension under G.L. Ch. 90 §24(1) (f) & (g) depends upon the following:

> (1) Was there probable cause for the licensee's arrest?
> (2) Was there an arrest?
> (3) Did the licensee refuse to submit to the breathalyzer

test after having been informed that his license shall be suspended for a period of ninety days for refusing to take the test?

Under the procedure, a police officer, before whom the licensee allegedly refused to take the breathalyzer test, files a one page "form" affidavit with the Registrar setting forth the grounds for the officer's belief that the licensee had been driving under the influence of intoxicating liquor and that he refused to take the breathalyzer test and, further, that the licensee was in fact arrested for driving under the influence of intoxicating liquor. Upon receipt of the form affidavit, the Registrar automatically suspends the driver's license.

On the basis of the one page "form" affidavit, the Registrar maintains at p. 14 of his Jurisdictional Statement that the risk of factual error under the Massachusetts procedure is minimal because one must assume that the police officer's report will be reliable. Montrym, on the other hand, traverses the Registrar's presumption. He asserts that the risk of factual error is substantial because the Registrar's determination is based solely on the accuser's affidavit and, secondly, because the

basis for revocation is predicated upon subjective facts.[2] As such, Montrym maintains that the risk is not even comparable to that under the Illinois procedure which involved a narrow inquiry into objectively ascertainable court convictions.[3]

III The Public Interest Would Not Be Affected By The Availability Of A Pretermination Opportunity To Respond.

Under G.L. Ch. 90, §24(1)(f), if a licensee takes the breathalyzer and

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2 Apart from the possibility of factual error, there also lies the risk of error in the Registrar's application of the law to the facts in determining whether there was probable cause to justify an arrest, and whether there was a valid arrest.

3 In the instant case, a Massachusetts district court dismissed the criminal charges brought against Montrym and entered a specific finding of fact that the police had refused to give him the breathalyzer test. The Registrar was bound by this decision under principles of collateral estoppel. Cf. Almeida v. Lucey, 372 F. Supp. 109 (D. Mass.), aff'd 419 U.S. 806; and Costarelli v. Panora, 423 F. Supp. 1309 (D. Mass.), aff'd 431 U.S. 934. Notwithstanding the specific findings of fact by the district court, the Registrar refused to return Mr. Montrym's license.

flunks the test, the Registrar does not suspend his license until and unless he is subsequently found guilty by a judicial tribunal of driving under the influence of intoxicating liquor, an offense under G.L. Ch. 90 §24(1)(a) & (b). Accordingly, there is no legitimate state interest in denying a licensee a minimal opportunity to respond[4] prior to the Registrar's action in revoking his license for failure to take the breathalyzer test. Far more important, however, is the fact that since the passage of Chapter 505 of the Acts of 1975, G.L. Ch. 90 §24D, ninety-five percent of all licensees charged with, or found guilty of, driving under the influence of intoxicating liquors elects to enter the Driver Educational Alcohol Program. Under this procedure, the criminal charges are continued without a finding of guilty being entered upon the record. Consequently, the Registrar does not revoke the licenses of almost all drivers who are

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4 Montrym does not maintain that the Constitution requires a presuspension hearing before termination. His position is simply that Massachusetts must afford him an opportunity to respond or "to present his side of the story," Goss v. Lopez, 419 U.S. 565, 580, 583-584.

truly drunks on the road.[5] We think the passage of Chapter 505 manifests a legislative judgment that it is not necessary to remove drunk drivers from the highways and, accordingly, we cannot understand what legitimate state purpose would be achieved in denying an accused licensee the opportunity to respond prior to having his license revoked under Ch. 90 §24(1)(f).

CONCLUSION

For the reasons set forth above, Montrym maintains the district court's conclusion that Dixon v. Love, supra, is distinguishable, and not controlling, should be sustained. Accordingly, Montrym moves this court to summarily affirm the judgment below or, alternatively, set this case down for plenary consideration.

By his attorney,

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5 Some district courts do suspend the driver's license for periods between thirty and ninety days as a precondition to a licensee's entering the Driver Educational Alcohol Program. However, some of these courts permit hardship licenses similar to those granted under the Illinois procedure. This practice varies according to geographical location within Massachusetts.